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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1905.

Office Supreme Court U. S.
FILED
MAR 6 1906
JAMES H. McKENNEY,
Clerk.

UNITED STATES

vs.

THE MILLIKEN IMPRINTING COMPANY.

No. 227.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

DAVID MILLIKEN
Attorney for Appellee.

L. MIDDLEDITCH CO., 68 DUANE ST., N. Y.

IN THE SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES,
Appellant,

-AGAINST-

THE MILLIKEN IMPRINTING COMPANY,
Appellee.

Argument for Appellee.

This is an appeal by the United States from a judgment of the Court of Claims rendered in favor of the appellee on the 19th day of December 1904, adjudging that the appellee was entitled to a reformation of a contract upon the ground of mistake, entered into by it and the appellant and damages for the breach of the contract as reformed (40 Court of Claims 81). Upon the trial the appellant waived the question of damages and relied upon the want of jurisdiction in the Court of Claims to reform a contract and upon the lack of evidence to support the fact of mistake.

By Act of Congress passed March 3, 1898, the Commissioner of Internal Revenue was required to provide revenue stamps to be placed upon bank checks, drafts, etc., and he was authorized, in the event of being unable to have this work performed by the Bureau of Engraving and Printing, to secure it by contract upon such terms, restrictions and regulations as he might impose. This contingency having arisen, he made a contract with appellee among others, for the period of one year, ending July 1, 1899. Prior to the expiration of its said contract, appellee was invited in writing under date of April 15, 1899, by the Commissioner to make another con-

tract which, as to its terms and conditions, was to be the same as the said former contract, except that the amount of consideration was to be made thirty-four hundred dollars ($3,400) instead of twenty-five hundred dollars ($2,500), a uniform price to be established for the work done and that it was to provide that the appellant would not receive or grant an application for a similar contract from any person or firm or corporation which was not engaged in the business of imprinting stamps under contract with the Government on the 25th day of April, 1899, and further, that no application would be received or granted after the 25th day of May, 1899, which constituted the inducement to appellee to make a contract, and was so meant to be by appellant,as shown by the form of address used in the communication containing it, which was to contractors only and not to the public generally, and without which appellee would not have made the contract. The appellee, in writing, accepted and entered into said agreement, and subsequently executed a contract without examination or reading, upon being informed by a representative of appellant that it embodied the said agreement.

Subsequent to the said 25th day of May, and after the execution of the contract, the Commissioner did receive an application for and grant a similar contract to the American Imprinting Company, a corporation which was not engaged in imprinting stamps under contract with the Government on the 25th day of April, 1899, and which was organized solely for the purpose of doing that work. Upon learning this, which was prior to the 1st of July, 1899, appellee discovered that its contract did not conform to the agreement it had made, by omiting to restrict the contracts to those who had them on the 25th day of April, 1899, and made application for them before 12 o'clock noon on the 25th day of May, 1899, of which it at once notified the Commissioner and the Secretary of the Treasury, who admitted that the agreement with appellee was that contained in the letter of April 25, 1899, and that the contract to the American Imprinting Company was in violation of the one made with appellee and had been

made through inadvertence. Appellee's demand for the revocation of the wrongful contract was evaded, but it was stated that if it were violated, it would be cancelled. Subsequently it was revoked for violations, but the revocation was subsequently rescinded.

The appellee's claim of mistake and breach of contract had been made continuously and always freely admitted.

The appellee had established its business at great expense, and which had become assured to it by the observance of the agreement in this action, but it became greatly impaired by the violation complained of for the reason that the American Imprinting Company became composed of persons who were having their work done by appellee, were satisfied with it and would have continued it with appellee had it not been for the contract granted to them to do the work for themselves.

The stamp tax on bank checks was compulsory. The appellant created its use and established a uniform price to be charged for imprinting it. All contracts were thus made uniform and no advantage could be given by one contractor over another. The business developed into a selection by the users of the stamps of the contractor to whom they would give it. Appellee had but one competitor within its territory, who, for strong trade reasons and dissatisfaction with his work, would not have been given the business lost to appellee who had the good will of the trade.

The appellee had provided a large plant and force, made a profit on its business and could have done the business it lost, for the additional expenses incidental to it.

The appellee suffered damage in the loss of profits on business in the sum of twenty-one thousand and eighty-four dollars and ninety-nine cents ($21,084.99).

These allegations of the petition are not controverted or denied by the evidence.

POINTS.

I

The Court of Claims proceeding as a Court of Equity: has power to reform a contract.

The Tucker Act (24 Stat L. p. 505.)

This court, in the United States against Jones, 131 U. S. I. construed that act as extending the jurisdiction of the Court of Claims to include claims for money arising out of equitable and maritime, as well as legal demands.

What constitutes an equitable demand was clearly defined by this court in the case of Harvey against the United States (105 V. S. 671). The Court of Claims at that time having no equity jurisdiction, the Congress, by special act, referred to it the claim of Harvey, to adjust the accounts between the parties as a court of equity jurisdiction, so far as they were *equitable unadjusted demands*, growing out of the contract the parties *intended* to make. The court then upon a trial reformed the contract and awarded damages for its breach as reformed. Upon appeal to this court, the judgment of the Court of Claims was affirmed, and an "equitable demand" was judicially defined as including an action for reformation of a contract, and damages for its breach as reformed.

The Tucker act subsequently passed extended the jurisdiction of the Court of Claims generally, as defined by this court in Jones vs. V. S. supra to include "equitable demands."

In the case of South Boston Iron Works viz The United States 34 *Ct* of Claims, 200, the court held that it had equity jurisdiction to reform a contract. This question was raised by the pleadings and the contention of the parties and was decided by a full bench. There was no appeal taken from that decision.

However, a recent decision of this court in District of Columbia against Barnes, 197 U. S. 146 distinctly holds that the Court of Claims has power to reform a contract.

In the lower court the only case relied upon by the ap-

pellant, was Jones *vs.* The United States, *supra.* That action was for a specific performance and clearly is not analogous.

In the case of District of Columbia *vs.* Barnes, 197 U. S. 150. it was held that "This court does not sit to review findings of fact made in the Court of Claims. They are regarded as conclusive here." "The province of the Court of Claims is to pass upon the justice of the claim and adjudge accordingly." Id. 151 "One who has the right to money relief upon a contract mistakenly omitted to be reduced to writing in accordance with the true agreement of the parties, has a claim of equitable cognizance, for the contract must be reformed to meet the intention of the parties and when corrected may be adjudged a valid claim." Id. 152.

"The Court of Claims may determine the money relief to which the claimant is entitled, whether arising out of an equitable or legal demand." Id. 152. "The facts found by the Court of Claims are conclusive upon the United States Supreme Court." Id.

pellant was Jones vs The United States, supra. That action was for a specific performance and clearly is not analogous.

II.

A contract may be reformed and enforced as reformed. in the same action.

Harvey *v.* U. S. 105 U. S. 671;
Avery *v.* Eq. Assn. Soc'y, 52 Hun. 392;
Maher *v.* Ins. Co. 67 N. Y. 283;
Jaye *v.* Ins. Co. 55 N. Y. 657;
West *v.* Suda, 69 Conn. 60.

A bill or complaint which asks the rectification of a mistake in a written contract and the enforcement of the instrument as reformed states but one cause of action.

Harvey v. United States, 105 U. S. 671;
Avery *v.* Ins. Co. 52 Hun. 392;
Maker *v.* Ins. Co. 67 N. Y. 283;
Jaye *v.* Ins. Co. 55 N. Y. 657;
West *v.* Soda, 69 Conn. 60;
Hutchinson *v.* Ainsworth, 73 Col. 452;
Franklin Ins. Co. *v.* McGea, 4 Greene (Iowa), 229:
McClurg *v.* Phillips, 49 Mo. 315;
Mayer *v.* Van Cullam 7 Abb. Pr. (N. Y.) 222.

"Actions to reform instruments and to enforce the same as reformed by judgments for the recovery of money, constitute but one cause of action, however various may be the reliefs demanded and granted."

Pomeroy on Remedies, sec. 459.

In the case of Mayer *v.* Van Cullam, reported in 7 Abb. Pr. (N. Y.) 722, the nature of this action is clearly defined as follows:

"The unity of the right to be enforced or the wrong to be redressed, constitutes the unity of the action. The kind or the multifariousness of the proceedings in an action

does not affect the unity of the action, which depends solely on the unity of the right to be completely enforced or the wrong to be completely redressed. In actions to collect debts, the wrong is the detention or non-payment of the debt and the wrong has been completely redressed, when the creditor has got his money. But because the complaint not only asks for judgment, but for a receiver and injunction, remedies which the plaintiffs are clearly not entitled to before they have got their judgment, does it follow that it contains another cause of action or more than one cause of action. Certainly not, because these remedies are asked for the purpose of collecting the *same* debt, or in other words, as means to redress but one wrong and the same wrong."

III.

The defendant had power to make the contract with the petitioner.

Act of March 3, 1899.

IV.

The contract was approved by the Secretary of the Treasury (p. 20).

This approval may be shown circumstantially.

V.

The written application in connection with the proposal and the acceptance of that application constitutes the contract between the parties.

Hearns *v.* Ins. Co. 20 Wallace, 488;
Equitable Ins. Co. v. Hearns, 20 Wallace, 494;
Harvey *v.* U. S. 105 U. S. 671;
Garfield *v.* U. S. 93 U. S. 242.

In the latter case, the court held, that proposals and acceptances are not required to be drawn as if they were subject to the criticism or dissection of a demurrer in a court of law.

There was in the first written draft agreed upon by the claimant and defendant, the contract between them.

Palmer *v.* Hartford Ins. Co. 54 Conn. 510

In the case of the Equitable Ins. Co. *v.* Hearne, which was an action to reform a policy of insurance, the court said:

"The policy was intended to put the contract in a more full and formal shape. The assured was bound to read the letters of the company in reply to his own, with care. It is to be presumed he did so. He had a right to assume that the policy would actually conform to the agreement thus made, and to rest confidently in that belief. It is not probable that he scanned the policy with the same vigilance as the letters of the company. They tended to prevent such scrutiny and, if it were necessary, threw him off his guard."

The letter of the Commissioner dated April 25, 1899 and received by appellee (p 51), is admitted by appellant (pp. 61, 62).

The appellee's letter of acceptance made in accordance with the Commissioner's letter (pp. 15,16) was delivered to the Commissioner, (pp. 51,52), was accepted by him and appellee's application was granted (p 52).

This is not denied.

Thus the letter of the Commissioner dated April 25, 1899 (pp. 5,6), became the contract between the parties.

VI.

Where the agreement, as reduced to writing, omits terms or stipulations contrary to the common intention of the parties, the instrument will be corrected or reformed, so as to make it conform to their real intent.

Hearne v. Marine Ins. Co. 20 Wallace, 488;

Hunt *v.* Rousmainer, 21 U. S. 174;
Andrews *v.* Essex Ins. Co. 30 Mason, 10;
Oliver *v.* Mutual Ins. Co. 2 Custis, 277;
Van Tuye *v.* Ins. Co. 55 N. Y. 657;
Pomeroy's Eq. Jur. Vol. 2, Sec. 849;
1 Story's Eq. Sec. 152.

"The office of a bill for the reformation of an instrument is not to establish and affectuate rights not to have the effect of the deed adjudged but rather to decline the status which the parties intended to create, and upon which such rights as they would have acquired under a correct instrument may be asserted and defended. The real question is, not what the real instrument was intended to mean or how it was intended to operate, but what it was intended to be."

Tillis *v.* Smith, 108 Ala. 264;,
Connor *v.* Armstrong, 86 Ala. 265;
Midland R. R. Co. *v.* Brown, 98 Ala. 647;
Parker *v.* Parker, 88 Ala. 362,

The court held in Hunt *v.* Rousmainer, that the advertisement inviting proposals and the written bid of the claimant accepted by the proper officer of the United States, but left out of the agreement by accident or mistake, was proper to be considered by the court in determining the rights of the parties, and the contract was reformed to the extent of making such advertisement a part of the contract.

The contract in the suit at bar omitted, by mistake, to provide as agreed upon, that no application for a similar contract would be received from any person, firm or corporation not engaged in imprinting stamps under contract with the Government on the 25th day of April, 1899, and that no application would be received after the 25th day of May, 1899 (pp. 5,6). By the preliminary agreement (pp. 5,6), the appellant precluded any discussion of the terms, etc., of the contract which included the aforesaid restrictions, by stating that *it had determined to add them to the contract*, thus compelling their acceptance.

The mistake, which is thus clearly shown is not denied.

The evidence relied upon by the appellee to establish the mistake is the letter of the Commissioner (pp. 5,6), and the appellee's acceptance (pp. 15,16).

It is documentary and indisputable.

Appellant's only witness testified that the letters and correspondence *about the contract* speak for themselves.

This admits that the preliminary agreement constitutes the real contract.

The only evidence which might be claimed to be against this admission and the documentary evidence of the appellee, is that of the appellant's witness, who testified that so far as he knew, there was no intention of including the restrictions in the contract (pp. 60, 61).

This is evidence and is not a denial, and is parol. If it means anything, it is that an attempt was made to deceive appellee.

Upon this the learned Chief Justic of the Court of Claims, in his dissenting opinion in Harvey *v.* The United States, said: "The court will not allow the defendant to impute *quasi* fraud to its own act." This view was adopted by the Supreme Court.

But the appellant's evidence is all in support of the claim of mistake.

Its only witness, E. C. Johnson, testified that he prepared the contract (pp. 60, 62), and it being desired to reduce the number of contractors, *the changes in the contract* were made (p. 60). He testified that the object of restricting the contracts to those who had them on the 25th day of April, 1899, and not to receive any application after the 25th day of May, 1899, *was to reduce the number of contractors* (pp. 60, 64). *The changes in the contract*, which he thus testified were to accomplish this (p. 60). were therefore clearly omitted by mistake.

Mr. Johnson testified further (p. 63), that after preparing the contracts he submitted them to the Commissioner. but he does not know wheher the Commissioner read them or not, and that he did not know whether the restrictions were to be included in the contract or not (p. 61), but he does not know whether the Commissioner read them or not, and that he did not know whether the re-

strictions were to be included in the contract or not (p. 61), but he also testified (p. 62) that it was the intention to restrict the contracts to those who had them on April 25, 1899 and not to receive applications for contracts after 12 o'clock noon on the 25th day of May, 1899. and therefore *good faith* should prevent any objection to the reformation of the contract as sought. He was not instructed to omit the restrictions from the contract and when the appellee discovered the mistake it was admitted by the Commissioner and the Secretary of the Treasury (p. 52).

It will be observed that there is no denial of the claim of omission. The Commissioner admitted the agreement to restrict (p. 52).

The question presented is one of evidence—

West *v.* Suda, 69 Conn. 60—

for which it is not necessary to look beyond the preliminary agreement.

Harvey *v.* U. S.

The question of "mistake" is one of fact.

It is clearly shown by the proposal and acceptance and the admission of the Secretary of the Treasury.

The evidence on behalf of appellant is, that it was their intention to restrict the contract and limit the time within which bids should be put in.

This surely is in corroboration of mistake. Then why not put it in the contract?

In United States against Smith, 94 V. S. 214-218, "this court said that it does not sit to review findings of fact made in the Court of Claims. They are regarded as conclusive here, and our jurisdiction is limited to a determination of such questions of law as are properly brought to our attention upon the record."

VII.

Subsequent conduct is important in determining the fact of omission.

Simpson *v.* U. S. 172 U. S. 372.

Appellee discovered almost immediately after the execution of its contract (p. 52) that it did not express the real intention of the parties, in that it omitted the restrictions as to contractors and time limit for applications. It then had an interview with the Commissioner and the Secretary of the Treasury, who stated that the letter of April 25, 1899, contained the agreement; that the contract to the American Imprinting Company had been granted through inadvertance (p. 52), and that it was a violation of appellee's contract (p. 53).

This has at all times been admitted (p. 53) and is not denied by the evidence.

On page 56 of the evidence it is made to appear that appellee did not specifically mention the restriction of the contracts in its acceptance, because it did not consider that they related *directly* to the subject-matter of the contract. This is made clearer and is corrected on pages 19, 20, 21, where it is shown that they constituted the inducement, and that without them it would not have made a contract.

Its conduct has always been consistent upon this point; it has always claimed the omission.

In its letter of acceptance, which it states is made in accordance with the Commissioner's letter of April 25, it specifically mentioned only the matters it was obligated to do (p. 19).

The appellee had built up its business at great expense (p. 20); it had but one competitor (p. 20), from whom most of the stationers had withdrawn their business when claimant began, because he had done it unsatisfactorily (pp. 26, 36, 37, 40, 42) and because he was a competitor of the stationers in making bank checks, etc.; it was against their interest to entrust their business to him, for the reason that he would ascertain for whom they were doing business and to what extent, and could also copy their forms or styles of checks (pp. 36, 37, 42, 45), while appellee's sole business was the imprinting of the stamp.

Therefore appellee had the good will of the trade and was enabled to estimate the value of its contract. Its business could be preserved only by the restriction of the

contracts as agreed upon. By limiting the number of contracts as agreed, the volume of appellee's business would have been preserved as well as increased, hence the restrictions constituted the inducement to make a contract. and without them it would not have made it (pp. 20, 21).

Any claim that the mistake must be mutual is without avail.

But admitting for the purpose of the argument that the mistake must be mutual, the preliminary agreement (pp. 5,6), contains complete evidence that it was mutual. That is the best evidence of it and even though there should be a parol denial, the court would not consider it as against the documentary evidence.

But there is no denial of it. This Court in Harvey *v.* U. S. held that it made no difference whether the defendant shared in the mistake or not, *the contract was the written bid in connection with the advertisement and the acceptance of that bid.* Citing Garfield *v.* The U. S. and Equitable Ins. Co. *v.* The U. S. Thus clearly establishing what constitutes the necessary evidence of mistake and refusing to consider parol evidence against documentary evidence.

But there is no denial that there was a mistake in the contract in the suit at bar.

VIII.

The omission of appellee to read the final contract before execution does not affect its rights. The courts hold that he is not required to read it. West *v.* Suda, 69 Conn. 60. If it were so required a claim of mistake would cease to be a cause of action. Hence it is, that omission to read is the basis of the action for mistake and is presupposed.

The appellee *had a right to assume* that the contract would conform to the agreement made.

The rule of law that no one shall be allowed to escape his contract obligations by saying he did not read what he signed, is a most wholesome and necessary rule, *but* as applied to the fact of mistake, it is rule of evidence.

West *v.* Suda, 69 Conn. 60.

This rule is subject to the limitation that it is not to be applied in behalf of any person who by word or act has evidenced the omission to read.

Palmer *v.* Hartford Ins. Co. 54 Conn. 510.

This application of the rule was made in an *action at law*. In equity, of course, it would be much broadened.

The omission by appellee to read the contract before execution was based upon the assurance of Mr. Johnson, appellant's representative, that the only changes in it from the existing one were those contained in the letter of April 25 (pp. 52, 56, 59), which was the preliminary agreement. This is corroborated by Mr. Johnson, who testified that he could not say that he did not so assure claimant (p. 62).

It is shown that Mr. Johnson had the charge of preparing the contract and he therefore was a proper person for appellee to consult (pp. 60, 62).

It appears by appellant's testimony that the Commissioner did not read the contract before signing it (p. 63) but also relied upon Mr. Johnson.

It was not an original contract but the renewal of an existing one with some changes which appellee was compelled to accept (pp. 5, 6), and therefore less likely to scrutinize it.

IX

There is no rule of law which fixes the period within which discovery may be made that a writing does not express the contract which it was supposed to contain, and which bars relief for delay in asserting rights, short of the period fixed by the statute of limitations.

Palmer *v.* Hartford Ins. Co. 54 Conn. 509;
Phoenix Ins. Co. *v.* Gurnee, 1 Paige, 278.

In the same case it was held, that, "The Court of Claims is not bound by special rules of pleadings. The main purpose is to arrive at and adjudicate the justice of alleged claims against the United States. (United States

against Burns 12 Wall, 246; U. S. *vs.* Behan 110 U. S. 338).

X

It cannot be contended that the restriction in the proposal of the contracts to those who had them, was a mere notice.

The proposal (p. 5), says, "it has been determined to add the following *provisions* to the existing contracts. Among them is the restriction. There are no quotation marks to divide or separate it, so it must be taken as a whole. The Secretary of the Treasury, whose approval of the contracts and of the terms, conditions and restrictions upon which they were made, was necessary, said that the "proposal" (p. 5) was the agreement and that the contract complained of was a violation of it(p. 52). He could have been called to testify by the appellant whose witness he properly was, in New York, where testimony was taken but he was not. The only witness for the appellant testified that it was their intention to restrict the contracts and not to receive applications after May 25, 1899 (p. 62). Then why object to putting it on the contract? There is no denial that it was to be included in the contract or that there was a mistake in leaving it out.

The "proposal" was addressed to existing contractors *only* it was not a general announcement. The public was excluded from bidding. To whom, then, could it be a notice? It would be absurd to say that it was a notice to the public, who had been excluded, through and by way of the contractors. It certainly was not a *notice* to the contractors, for the proposal was and was intended to be addressed to them only and for their benefit. It was the agreement, and was intended to be just as much of an inducement to make a contract as was the compensation and was meant to increase their profits (p. 53). Upon discovering the wrongful contract, which was very soon after it was made, appellee at once protested to the Secretary of the Treasury, the Commissioner being absent, when the proposal (p. 5) was admitted to be the contract (p. 52). This is not denied. It is clear that the appellee

always considered the rstriction a part of the contract. Good faith should prevent opposition to the claim of mistake.

Again the limitation of time with which bids should be submitted, was material, for it is inconceivable that any person would enter into a contract involving the great expense of providing a plant, were it left open to the other party to the contract to practically nullify it, by granting the same privilege at any time to others. Hence, limiting the time for bids to the 25th day of May at 12 m. constituted one of the chief inducements to appellee to make the contract, as the competition it would meet was then fixed and certain.

However, this is a suit in equity, and the court will consider it only with a view to rendering substantial justice. Will it therefore set aside the unanimous conclusion of the court below, that justice, which is the purpose of that court, requires the establishment of the appellee's rights as claimed by it?

The reformation of the contract could work no injustice to appellant, for the omitted provisions, it admits contained its intentions, and there isn't a line of evidence to show that they were not to be embodied in it..

The contract was of great pecuniary advantage to the appellant, for it received the full face value of each stamp without any expense and its supervision of the work was paid for by appellee.

XI.

It can not be claimed that the omitted provisions did not properly pertain to the contract.

Without the provision limiting the time of application for contract, appellee would not have made one, for it precluded the appellant from granting similar contracts during the life of appellee's. Otherwise it would have defeated its object, which was the profits to be derived from it. This applies with equal force to the restriction of contracts, for there was but one other contract within

appellee's territory, the force of which was of but little signifiance, as appellee possessed the good will of most of the persons requiring the imprinting of stamps. But, in any event, the court has power to consider it in this action as operating as a breach of contract.

XII.

No question of public policy or interest can arise.

The interests of the public could not have been served by the granting of additional contracts, for the reason that the price to be paid for the work was absolutely fixed by the appellant and no deviation from it permitted, and the service provided was ample. Furthermore the act authorized such terms, restrictions and regulations as the Commissioner might impose.

XIII.

Appellant having received an application for and granted a contract similar to the one entered into with appellee and subsequently to the 25th day of May, 1899, to the American Imprinting Company, a corporation not engaged in imprinting stamps under contract with the Government on the 25th day of April, 1899, violated its contract with appellee and is liable in damages.

The appellant's witness, E. C. Johnson, testified that the American Imprinting Company was not imprinting stamps under contract with the Government on the 25th day of April, 1899, (p. 63), and that its application for a contract was made and granted subsequent to the 25th day of May 1899, (p. 6).

The contracts were limited to those who had them on the 25th day of April, 1899, by the preliminary agreement (pp. 5, 6).

XIV.

The broad general rule is, that the party injured is entitled to recover all his damages, including gains prevented, as well as losses sustained, upon a breach of contract.

Adams' Case, 1 Ct. of Cl. 106;
United States *v.* Behan, 110 U. S. 338;
Hitchcock *v.* City of Galveston, 3 Woods, 294;
Griffin *v.* Colver, 16 N. Y. 489;
Witherbee *v.* Mayer, 155 N. Y. 446;
Wittenberg *v.* Mollyneux, 83 S. W. 842;
Bagley *v.* Smbith, 10 N. Y. 446;
Masterston *v.* Mayor, 7 Hill, 62;
Hale on Damages, p. 73;
Russell *v.* Horn, 59 N. W. 901;
Hale *v.* Hess, 46 N. W. 261;
DeHorton Co. *v.* Hopkins, 53 N. W. 501;
American Building & Loan Association *v.* Hunt 50 Pac. 468;
Mueller *v.* Bethesca Co. 50 N. W. 319.

The law governing the question is elementary. Damages arising naturally from a breach of contract may be recovered whether actually contemplated or not.

Hadley *v.* Baxendale, 9 Exch. 341.

Pecuniary losses are sustained when the profits of a contract are lost or the *earning capacity* is reduced.

Hale on Damages, 87.

The fact that damages are difficult of ascertainment and that the jury must, to some extent, speculate as to their amount, can not release the party in default on his contract from liability thereon.

Stossell *v.* Greenwich Ins. Co., 20 App. Div. 188: 46 N. Y. Supp. 802.

In the case of the U. S. *v.* Behan, 110 U. S. 338, the court held that profit and losses must be determined according to the circumstances of the case and the subject-matter of the contract.

The case of Whorley *v.* Tennessee Cent. Ex. Co. 62 S. W. 346, bears directly upon the case at bar. There

the defendant granted to plaintiff the exclusive right to sell tobacco, cigarettes and cigars within its grounds for a consideration. It was averred that defendant had violated its contract by allowing others to sell tobacco, which was denied. At one place it was shown that cigars were given as prizes for knocking down rag dolls. At another place, an encampment of soldiers, they were sold, and at a private club. These were all held to be violations. The court said upon the question of the amount of damages, it is shown in the proof, that on the business done the complainant made a net profit, had made all his preparations, built his stnds, acquire his space, paid his rent and had his help hired. Having all this, it would appear to follow that all additional sales made by him would be so much additional profit and that on all sales lost he would lose his profit. It is not a case of speculative or doubtful profits. Goods sold in violation of the contract should be treated just as if they had been sold by the Centennial Company itself, and that the complainant should be allowed just such profits as he would have made if he had sold the same amount of goods. It was impossible to determine the exact amount of sale made, but the court assessed the damages.

In the case at bar it is shown that the appellee had been doing the business of Stewart, Warren & Co., Brown, Lent & Pett Milton C. Johnson & Co. Wm. Mann Co., J. H. Warner, and Styles & Cash, and would have continued to do it, had it not been for the contract to the American Imprinting Company, which they organized for the purpose of making the profit on their own business (p. 53).

John T. Stewart testified that they had had their work of imprinting stamps done by the Franklin-Lee Company, who did it so unsatisfactorily that they transferred it to appellee when it began (p. 26), who continued to do it down to July, 1899, when the American Imprinting Company began business. He was an organizer and stockholder in that company, which was composed of stationers and organized for the purpose of imprinting stamps upon checks, etc., (p. 26) for themselves (p.26), and that if it had not been for the contract to the American Imprinting Company they would have continued to give their busi-

ness to the appellee (p. 26). That their work done by the American Imprinting Company cost less than if done by the appellee, because they, as stockholders, made a profit on the business, and the reason they formed the company was to have the profit that the appellee would otherwise have reaped (pp. 27, 28, 29).

The testimony of all the other witnesses is to the same effect (pp. 29, 30, 32, 33, 34, 35, 38, 41, 42, 48, 49, 50, 51,). They testify to the dissatisfaction with the work which had been done by the only competitor of appellee and to the objection to his being a competitor of theirs in making checks, etc. (pp. 26, 40, 42, 36, 37, 42, 45).

This is clear evidence of a direct loss of profits on business to appellee arising from appellant granting the contract to the American Imprinting Company.

The appellee shows that its plant, space, help and force were sufficient to do the additional amount of business which it lost, with the addition of incidental expenses enumerated (pp. 20, 53, 58); that it had made a profit on its business (pp. 22, 53, 58), and had paid to the appellant thirty-four hundred dollars ($3,400), the consideration for its contract (p. 53). The appellee shows (p. 20) that one-half of its plant became idle through the granting of the wrongful contract.

It therefore clearly follows that all additional business done by appellee would have been so much additional profit, and that on all business lost it lost its profit.

The amount of loss of business to appellee was as follows:

Stewart, Warren & Co.,	(p. 26)	9,278,207	stamps.
Brown, Lent & Pett,	(p. 30)	2,721,859	"
M. C. Johnson & Co.,	(p. 49)	5,000,000	"
J. H. Warner,	(p. 34)	3,663,093	"
Wm. Mann Co.,	(p. 47)	5,705,000	"
Styles & Cash,	(p. 38)	2,219,350	"
Which at eighty cents a thousand, the contract price, amount to a profit of . . .			$22,869 99
From which is to be deducted the expenses of doing this additional amount of business (p. 20)			2,285 00
Making the total loss of profits (p. 20) . .			$20,584 99

Appellee also provided one new press at a cost of $700, upon which it suffered a loss of $500 (p. 20).

The total amount of appellee's loss was $21,084.99, of which there has been no assignment or transfer (p. 20).

XV.

The payment by appellee to appellant of a consideration amounting to thirty-four hundred dollars ($3,400), for its contract, broadened its rights and entitled it to the fullest protection.

The appellant reaped very large benefits from the contract, through receiving two cents for each and every stamp imprinted free from any expense. The nine hundred dollars additional consideration was a special consideration for the restriction of the contracts (p. 20, 22).

XVI.

There was no change in the parties claimant.

The evidence shows that the original contract was made with David Milliken, Jr., & Co., which was formed for the sole purpose of operating under it (pp. 54, 57), and who made the application for the contract in the suit at bar, but desiring to change the description of the persons constituting that firm, was permitted by the Commissioner to substitute the name "The Milliken Imprinting Company," and the contract was made out in that name (58). The parties were identical and the same (p. 58).

This is not denied and is shown by the contract itself (p. 6).

Equity would not allow the appellant to take advantage of such permission.

XVII.

The appellee has always been loyal to the Government.

XVIII.

The judgment of the Court of Claims should be affirmed.

DAVID MILLIKEN.
Attorney for Appellee.